

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76-1214

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1214

UNITED STATES OF AMERICA,

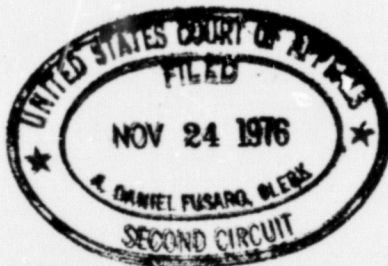
Appellee,

-against-

RONALD ROBINSON,

Appellant.

PETITION FOR REHEARING



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Assistant United States Attorney
(Of Counsel)

DAVID G. TRAGER
United States Attorney
Eastern District of New York

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UNITED STATES OF AMERICA,

Appellee,

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Appellant.

PETITION FOR REHEARING

PRELIMINARY STATEMENT

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, petitions for rehearing of the decision in this case entered on November 10, 1976 by a panel of this Court, which reversed the judgment of conviction of appellant Ronald Robinson and remanded on all counts with instructions to dismiss the indictment as to the possession counts. It is our contention that dismissal of these counts was improper under Bryan v. United States, 338 U.S. 552 (1950).

Appellant had appealed from a judgment of conviction for eight counts of uttering forged U.S. Treasury

checks (18 U.S.C. §§495 and 2), eight counts of unlawfully possessing the same eight checks after they were stolen from the mail (18 U.S.C. §§1708 and 2) and one count of conspiracy to steal from the mails, forge and utter U.S. Treasury checks (18 U.S.C. §371). The panel determined that, inter alia, the government's proof was insufficient to establish that the U.S. Treasury checks, the subject of the possession counts, were stolen from the mails. It was held that the evidence that the payees always received the checks by mail, coupled with the fact that they had been issued by disbursing offices outside New York, was insufficient to sustain the charge that the checks possessed were stolen from the mails. We do not, by this petition challenge this holding and the government will, of course, in future cases, offer the necessary evidence. However, as discussed below, it is our contention that the possession counts should have been remanded for a new trial and not ordered dismissed.

REASON FOR GRANTING THE PETITION

On the authority of United States v. Wilson, 420 U.S. 332 (1975), the panel opinion directed that the possession counts, which had been reversed for insufficient evidence, be dismissed (Slip. op. p. 450, f.n. 5):

"Because the ground for reversal relates not to a trial court error, but rather to a failure in the government's proof, a retrial of appellant on the possession counts would violate his double jeopardy rights. See United States v. Wilson, 420 U.S. 332 (1975).

We submit that United States v. Wilson, 420 U.S. 332 (1975), which concerned an appeal by the government, not an appeal by a defendant as here, is not authority for this result. The prohibition against double jeopardy simply does not apply to an appellate reversal for insufficient evidence following an appeal by the defendant. United States v. Bryan, 338 U.S. 552 (1950).

Accordingly, we submit, the panel should not have directed dismissal on double jeopardy grounds, since under United States v. Bryan, supra at p. 560, a case involving insufficiency of evidence, the Supreme Court held, "Where the accused successfully seeks review of a conviction there is no double jeopardy upon a new trial." This rule has been uniformly followed in this Circuit. E.g., United States v. Steinberg, 525 F.2d 1126, 1134 (2d Cir. 1975), cert. denied, U.S. 96 S.Ct. 2167 (1976); United States v. Fiore, 443 F.2d 112, 116 (2d Cir. 1971); United States v. Lenhard, 437 F.2d 936 (2d Cir. 1970); United

States v. Garguilo, 310 F.2d 249, 254 (2d Cir. 1962); United States v. Lefkowitz, 284 F.2d 310, 316 (2d Cir. 1960); see also, United States v. Gioffi, 487 F.2d 492, 501 (2d Cir. 1973), cert. denied, 516 U.S. 995 (1974).

Although retrial is permitted following reversal of a conviction on insufficiency grounds where the accused appealed inasmuch as the Double Jeopardy Clause is not implicated, the government recognizes that this Court has the power to direct a dismissal under the authority of 28 U.S.C. §2106. See, in this regard, the exhaustive opinion of Judge Leventhal, in United States v. Wiley, 517 F.2d 1212 (D.C. Cir. 1975). However, since the panel, in ordering dismissal, relied on the Double Jeopardy Clause, it seems obvious that the dismissal was under constitutional command and not in the interest of justice. We contend, therefore, that since the double jeopardy protection is not here applicable, rehearing should be granted and the possession counts be remanded for a new trial.^{1/}

^{1/} The applicability of 18 U.S.C. §2106 to the issue of retrial following reversal for insufficient evidence was neither briefed nor argued on this appeal. The importance of this issue is deemed of such magnitude that before adopting a supervisory rule generally prohibiting retrials after such reversals, as the District of Columbia Circuit did in United States v. Wiley, supra, we believe that this Court should require plenary consideration of the issue.

CONCLUSION

The petition for rehearing should be granted
and the possession counts remanded for a new trial.

Dated: Brooklyn, New York
November 24, 1976

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

BERNARD J. FRIED
Assistant United States Attorney
(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

-----EVELYN COHEN-----, being duly sworn, says that on the 24th-----
day of November 1976-----, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a Petition for Rehearing-----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

-----William J. Gallagher, Esq.
Federal Defender Services Unit
Legal Aid Society
509 U.S. Courthouse
Foley Square
New York, N.Y. 10007-----

Sworn to before me this
24th day of Nov. 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen